86-796

Supreme Court, U.S.
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NO. 85-7580

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND JACKSON

PLAINTIFF - PETITIONER, PRO SE

V

NATIONAL BROADCASTING COMPANY,
WARNER BROTHERS TELEVISION,
D. C. COMIC BOOK, INC.

DEFENDANTS - RESPONDENTS

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

RAYMOND JACKSON
PRO SE
7200 Westmoreland Drive
Fairfield, Alabama 35064
(205) 925-4183

QUESTIONS PRESENTED

This case presents the following issues to the honorable court to resolve:

1) Whether or not, Appeals Court committed reversible error in affirming the District Court judgment which granted a summary judgment on unnotarized unverified affidavits amounting to deprivation of property without due process of law?

2) Whether or not, Appeals Court affirmed District Court error which granted summary judgment to defendants who acted in bad faith by executing motion for summary judgment based on affidavits that were not executed on June 21, 1985, but allegedly later executed on June 20, 1985 after summary judgment granted.

ARGUMENT

I

Vital evidence to the Plantiff's case in rebutting Kenneth Johnson's testimony as to what his co-worker saw and did not see was accepted by the District Court, and the death of his co-worker was withheld from Plaintiff by counsel until they were granted summary judgment too late to rebut Kenneth Johnson's affidavit statement.

II

Tampering with the evidence by the clerk, Mrs. Sandra J. Richerson, and the cover up on the part of her superior James E. Vandergrift, the head court clerk.

III

Fraudulent affidavits were induced into the files of the Eleventh Court Circuit without court knowledge between October 23rd and November 28th, 1985 after appellant filed a bad faith affidavit against the defendants.

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STATEMENT OF JURISDICTION

This court has jurisdiction of the instant appeal by Certiorari under 28 U.S.C. Section 1291.

STATEMENT REGARDING PREFERENCE

This case is not the kind entitled to preference in proceeding. However, a critical issue of constitutional import is involved with respect to being deprived of property without due process of law.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellant in the District Court and the Court of Appeals, Eleventh Circuit was himself R ymond Jackson, pro se. Counsel for Appellee both below and in the Appeals Court was James C. Barton and Patrick M. Lavette, Esq.

Kenneth Johnson, Rebecca Sobel, NBC, Warner Brothers Television, D. C. Comic Books, Brandon Tartikoff, Jeff Sagansky, the president and vice-president of NBC, respectively, have an interest in the outcome of this litigation.

Raymond Jackson

RAYMOND JACKSON
PRO-SE

TABLE OF AUTHORITIES

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Bennett v. Russ Berrie & Co. 564 F. Supp 1576, 32 Bna Fep Cas 225 — iv

Berns v. Civil Service Com. 417 F. Supp 17. § 537 F2d. 714 — iv

Egleston v. State University College, 535 F2d 752 — iv

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Hotel & Restaurant Employees Alliance, etc. v. Alleghany Hotel Co. (1974. DC pa 374 F.Supp 1259 — iv

Inmates Washington County Tacl v. England, S16 F. Supp 132 — iv

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Manetas v. International Petroleum Carriers, Inc. 541 F2d 408 — iv

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Quaker Chair Corp v. Litton Business Systems, Inc. (1976 DC NY) 71 FRD 527

Schoerbaum v. Firstbrook. 405 F2d 215, 23L Ed 2d 219

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RESTATEMENT OF FACTS

Plaintiff filed a charge of Copyright Infringement on March 19, 1985 alleging that the defendants, NBC Television, Warner Bros., and D. C. Comic Gook, Inc. in Infringement upon the Colossus Spaceship. In 1979 appellant created the concept for a black comic book character called Colossal Man." Appellant also designed a Spaceship for the Colossal Man, known as "The Colossus." On September 24, 1981, pursuant to 17 U.S.C. §408, appellant duly applied for a copyright of his Colossus design and received a copyright of his spaceship. (See Appendix pp. 24-25.

Appellant has the sole and exclusive rights to utilize, reproduce and publish the design of the spaceship Colossus, pursuant to 17 U.S.C. ¶ 105 defendants use of said design constitutes a knowing and willful infringement of copyright law under 17 U.S.C. ¶ 105.

Defendants have profited by this infringement. After being properly served, all defendants answered timely and filed for a motion for summary judgment with affidavits, (questionable and unverified or unnotarized).

STATEMENT OF THE CASE

COPYRIGHT INFRINGEMENT

This is an action for judicial review of a decision of the trial judge for the Northern District of Alabama, Southern Division on a claim of copyright infringement. The trial judge rendered a decision adverse to Appellant on August 13, 1985 in granting a summary judgment to the defendants.

STATEMENT OF THE FACTS

The general question presented by this appeal is whether or not the Appellant owned a valid copyright to a spaceship called the Colossus and whether or not there was a copyright infringement by the defendants under one of three possible circumstances. One circumstance is if the defendants had access

to copyright material and the other is, did the defendants copy the copyright materials. Allegedly on June 20, 1985, with the help of a notary public who worked in the Legal Department and now works with Mr. Johnson, notarized Mr. Johnson's affidavit as valid on June 20, 1985 as being the person who designed the Mother Ship which was an infringement upon the Colossus Spaceship. It is impossible for an affidavit to be in both California being executed on June 20, 1985 and Birmingham, Alabama at the same time--June 21, 1985. And finally both alleged being submitted for summary judgement affidavits which were supposedly signed by Kenneth Johnson were both unverified or notarized.

FACTS

TAMPERING WITH EVIDENCE

On August 21, 1985, plaintiff after receiving summary judgment on August 13 called the Federal Court clerk office and spoke with a Ms. Lancaster and asked her to check the affidavits of Kenneth Johnson and Rebecca

Sobel to see if their affidavits were notarized and signed. Ms. Lancaster stated she would have to go to the basement to get the files and would call back in about an hour or so, but instead she had a "Miss Ann" or someone with a name similar to Ann call to say she was returning the call for Ms. Lancaster.

I asked this person to check the affidavits and see if the name above the typed name of Kenneth Johnson spelled out the name Kenneth Johnson because I had a copy and could not tell what it spelled. She said with looking at the original it does not look like it spelled Kenneth Johnson. (See Appendix, p. 21.) Affidavit not notarized and not a legible affidavit signature.

I then asked her to see if the affidavit was notarized and she said "no." After a week of checking on the validity of affidavits I called Ms. Lancaster back and asked her to check the affidavits again because she knew the files by then. I asked her to check the name above the typed name of Kenneth Johnson.

And she said it looks likes chickens wrote it and she could not make it out, but it did not look like Kenneth Johnson. Plaintiff then asked Ms. Lancaster to see if the affidavits of both Kenneth Johnson and Rebecca Sobel were notarized. She said no. (See Appendix, p. 22). Rebecca Sobel's affidavit was not signed or notarized. They did not look like the same one on the affidavits which were used before were used again to refile on July 5. The plaintiff on November 8 went to Atlanta, Georgia to the Eleventh Circuit after becoming suspicious as to why the defending attorneys requested a copy of the Appellant's Brief of Law when appellant had already sent them one. Upon checking the files appellant found new affidavits he was not served and saw no certificate of service filed with those affidavits in the files on being recorded on the dockets sheet. Yet the affidavits showed file as of July 5. (See Appendix, p. 25., Docket Sheet.) No certificate of service

recorded on July 5. (See note at bottom of page.)

Appellant called this to the attention of the deputy clerk. The appellant had copies made of these alleged affidavits. Appellant then went back to Birmingham, AL.

Appellant then asked a Ms. Barber Jones who is an attorney to go with him to the Federal Court office to be a witness when the appellant spoke to Ms. Lancaster and her co-worker who could confirm that appellant had

asked her to check the affidavits of Kenneth Johnson and Rebecca Sobel on or about August 21 to see if there were any new affidavits filed other than the first affidavits which were used to refile again on July 5.

According to the docket sheet it was Ms. Lancaster who filed the alleged affidavits as of July 5, and it was she who filed the affidavits showing no certificate of service which appellant would later find out it was she. If the defending attorneys had filed a new notarized affidavit of Kenneth Johnson and Rebecca Sobel and it was Ms. Lancaster who recorded it and the affidavits had the certificate of service with it, it would show on the docket sheet, but the defending attorneys could not afford to serve a certificate of service with it, it would show on the docket sheet, but the defending attorneys could not afford to serve a certificate of service because appellant would have known at that time the summary judgment

was granted on August 13, after checking with Ms. Lancaster appellant would have known those affidavits were fakes, and appellant would not have gone thru all the expense of time, money and the trouble of filing a Bad Faith affidavit.

Appellant had a hard time getting the clerk, Mr. Vandergrift, to let Ms. Lancaster speak to him. After about ten to fifteen minutes, Mr. Vandergrift let Ms. Lancaster speak with the plaintiff.

Appellant could not understand when speaking with Ms. Lancaster why Mr. Vandergrift would become so negative.

When the appellant showed the affidavits to Ms. Lancaster and Mr. Vandergrift and stated the affidavits had to have been backdated to July 5, and showed them at the top of the affidavit the initials S.J.R. and stated this is where it was signed to make it appear as if it were served. At the time of making that statement plaintiff did not know that those letters stood for being signed but

stood for the person's initials who filed the alleged affidavits and had backdated those affidavits to July 5 when the plaintiff accused whoever S.J.R. of backdating those affidavits to July 5.

Mr. Vandergrift nor Ms. Lancaster would speak up and stated that it was Ms. Lancaster also now known as S.J.R., Sandra J. Richerson, who had filed those affidavits as of July 5. Mr. Vandergrift refused to let plaintiff file a complaint of evidence tampering in the District Court, thereby denying plaintiff discover of a coverup on the part of Mrs. Sandra J. Richerson of tampering with the evidence denying the plaintiff due process of law.

If at that time Mr. Vandergrift or Ms. Lancaster did not state those initials stood for Sandra J. Richerson meaning that she was Ms. Lancaster, the same person the appellant was talking to and told her face to face the person who filed those affidavits and backdated them to July 5 and she knew those

were her initials on the affidavits she was holding and looking at of Kenneth Johnson and Rebecca Sobel with her initials at the top (See Appendix, p. 20 - 21) of those affidavits and neither Ms. Lancaster or Mr. Vandergrift would not identify her as the person who filed those affidavits then this is a coverup on the part of Vandergrift for Ms. Lancaster also known now as Ms. Sandra J. Richerson, this is a conspiracy against the appellant with the attorneys, Mr. James C. Barton and Mr. Patrick Lavette, Ms. Anne M. Nardello, Ms. Joanne Wachter, both notaries public, Kenneth Johnson, and Rebecca Sobel of N.B.C. and Warner Brothers T.V. Plaintiff feels that Ms. Richerson and Mr. Vandergrift should be called before the Supreme Court and to explain why this happened because Mr. Vandergrift would not allow the plaintiff to file a complaint in the District Court denying the plaintiff due process of law tampering with evidence.

This conduct constitutes a conspiracy against this appellant and the big company

defendants know the courts will do nothing to stop them.

I was granted a copyright by the Federal Government's copyright office which is supposed to be protected by the Laws and Statutes of the Federal Government. Now I come to you to ask simply that you uphold those rules to protect the poor and innocent from scrupulous big business thieves as N.B.C.

On August 26th appellant filed his writ of certiorari, writ was returned back to him because he missed the rules laid down by the court and had to refile according to the rules. The defending attorneys' papers were accepted by the Appeals Court and the Appeals Court, therefore, discriminated against the appellant. (See Appendix, p. 24, bottom of page note.) Court used adverse dual standards by requiring appellant Jackson to verify and serve opposings counsel. Records show court refused Jackson's papers and accepted defendants affidavits showing double standards and prejudice to the appellant.

ARGUMENT

The defendants in this case by and through their attorneys of record violated the mandate of Congress in several aspects of the case.

1. Federal Rules clearly state that all papers destined for Appeals Court must have a certificate of service. Mr. Kenneth Johnson nor Ms. Rebecca Sobel alleged affidavits have no certificate of service, yet the Appeals Court has upheld the lower court's ruling granting a summary judgment on affidavits which have no certificate of service.

2. The court forced the appellant to have a certificate of service showing the defendants were serviced. This can be found in the letter sent to Appellant by the Appeals Court on October 28, 1985. (See Appendix, p. 24, bottom of the page note.)

3. Attorneys introduce affidavits unnotarized or verified on June 21, 1985 in a motion for a summary judgment stating they would present executed affidavits later of

Kenneth Johnson and Rebecca Sobel, how can a court accept a statement as an affidavit when not notarized? Allegedly attorneys claim to have an affidavit notarized which was allegedly executed June 20, 1985 one day before they stated they could not produce one on June 21. If this is true, the one who signed the unotarized affidavit on June 21, 1985 for a summary judgment and the signature on the signed affidavit is the same signature on the alleged affidavid allegedly executed June 20. This has to be a forged affidavit.

Note, Judge Acker stated in his order in granting summary judgment to the plaintiff if the defendants had called their spaceship the Colussus also, that he would have taken a different view in granting summary judgment. If the trial judge had read the case he would have found this information in the deposition on page 60 at question (5). James Barton asked the Plaintiff, "what you are saying is,

"the mothership: the orbitting Colossus. That serves as headquarters. This information was taken from the evidence of the D.C. Comic Cook 1985 Issue on page 1.

Pursuant to the Federal Rules of Civil Procedure Rule 56 (f) Appellant on July 28 sent a letter of request to the defending attorneys requesting information.

Appellant did not receive the letter from Mr. Lavette with the information about the death until August 14--forty six days later. The defending attorneys waited until they received their Summary Judgment. On the same day, the defending Attorneys received the order for Summary Judgment August 13 the defending Attorneys sent their letter arriving along with the order for Summary Judgment August 14--too late to rebut the defendant's affidavit which Judge Acker stated Appellant could not rebut in his order granting the Summary Judgment.

Evidence was introduced an accepted by the Appeals Court by the Eleventh Circuit that

Kenneth Johnson has been proven to have violated copyright material before. According to Nimmer this is basis to show prior copying by defendant to be used in present copyright case. (Nimmer Copying, § 13.01, 13.02 (A), 1978).

ARGUMENT AND CITATIONS OF AUTHORITY

A. THE TRIAL JUDGE APPLIED THE WRONG LEGAL STANDARD UNDER COPYRIGHT LAW IN ACCEPTING AFFIDAVITS OF BAD FAITH AND GRANTING SUMMARY JUDGMENT ON THOSE AFFIDAVITS' VALIDITY. WHEN THEY WERE NOT NOTARIZED OR SIGNED OR VERIFIED AS TO WHOSE SIGNATURE IS SIGNED ON THE AFFIDAVIT.

Copyright statutory and case law have long recognized one essential element of copyright law. (1) party must own a valid copyright certificate of registration, on question granting summary judgment.

Where the wrong legal standard were applied to reach a conclusion in a copyright case, the aggrieved party is entitled to a remand with directions to decide the question anew on application of proper legal standards.

(1) An uncertified copy of testimony in another proceeding may not be considered on a motion for summary judgment. Steven v. Roscoe Turner Aeronautical Corp., (CA 7th, 1963), 324 F.2d 157, 7 FR Serv. 2d 56c39, case 1.

Trademark and copyright cases. The courts are reluctant to grant motions for summary judgment in trademark and copyright infringement cases, e.g. Sanitized, Inc. v. S. C. Johnson & Sons, Inc. (S.D. N.Y. 1959), 23 FRD 230, 2 FR Serv. 2d 56a 24, case 1.

COPYING

This suggested definition of access is further consistent with the results reached in most cases. Roth Greetings Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970) (treatise cited).

Affidavits in support of motion for summary judgment which contained information and belief of affiant, opinions or impressions of state of mind or intent of other persons, hearsay, and conclusions, could not be considered on affidavit submitted under Rule 56(e) because none of such testimony would be admissible at trial. Hotel & Restaurant Employees' Affliance, etc. v. Allegheny Hotel Co. (a974, DC Pa) 374 F Supp 1259.

Summary judgment is properly denied where facts needed to oppose motion for summary judgment are within exclusive knowledge or control of moving party Schoenbaum v. Firstbrook (1968, CA2 NY) 405 F2d 215, cert den 395 U. S. 906, 23 L Ed 2d 219, 89 S Ct 1747.

SUMMARY

The Appellant, Raymond Jackson, asserts that the order issued by the District Court granting Summary Judgment in favor of defendants was an abuse of discretion and resulted in appellant being deprived of a property right by Registered Copyright without due process of law contrary to the guarantee of the United States Constitution by and through the 14th Amendment.

CONCLUSION

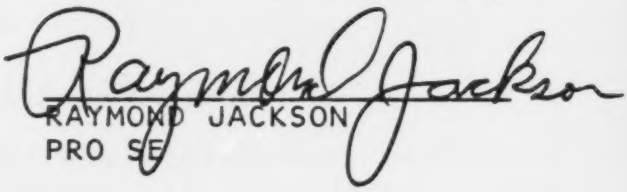
Numerous errors in the proceedings below require the decisions below to be vacated and remanded, with directions, for further proceedings. On the question of whether or not the trial judge erred in granting summary judgment on bad faith affidavits submitted by the defending attorneys on behalf of their clients, Kenneth Johnson and Rebecca Sobel and the failure on the judge on his behalf in not compelling the defendant attorneys to submit fully executed affidavits, the judge should be

directed to (1) make a specific finding, on proper evidence, of whether or not the parties entered valid affidavits; (2) consider whether or not Appellees willfully entered bad faith affidavits; (3) not to apply any presumption in favor of the defendants but instead to bear the burden they did not.

Furthermore, the Judge should be directed to make specific credibility findings, concerning both Appellees and the attorneys on these critical matters discussed in subparts G and H of the Argument herein.

Finally, the attorneys should be forced to submit a certified signature of Kenneth Johnson to compare signatures on affidavits.

Respectfully submitted,



RAYMOND JACKSON
PRO SE

7200 Westmoreland Drive
Fairfield, AL 35064
(205) 925-4183

IN THE UNITED STATES SUPREME COURT
ON APPEAL FROM
THE ELEVENTH CIRCUIT

RAYMOND JADKSON,

APPELLANT,

v. Case No. 85-7580

NATIONAL BROADCASTING CO.,

et al

APPELLEES.

CERTIFICATE OF SERVICE

I, Raymond Jackson, appearing pro se, hereby certify that I have this day served a copy of the within and foregoing Appellant's Brief for a petition for rehearing and en banc. Upon counsel for Appellees, hand delivered this Oct 15th 1986 addressed to:

Mr. James C. Barton
Mr. Patrick Lavette
1100 Park Place Tower
Birmingham, AL 35203

RELIEF REQUESTED

Wherefore, premises considered, plaintiff demands judgment against all defendants in the amount of One Hundred Million Dollars ($100,000,000.00) plus cost and attorney's fees (including punitive damages of $150,000,000.00).

Raymond Jackson

Ramond Jackson - Plaintiff
PRO SE

APPENDIX

PUBLISHER'S NOTE:

The following pages are unavailable for filming;

2, 6 & 11

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND JACKSON,	)	
PLAINTIFF	)	
VS.	)	CIVIL ACTION NO.
NATIONAL BROADCASTING COMPANY, INC., et al.,	)	85-AR-0826-S
DEFENDANTS	)	

ORDER GRANTING SUMMARY JUDGMENT

In conformity with the accompanying Memorandum Opinion, the court expressly determines that there exists no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. It is therefore

ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgment are GRANTED. JUDGMENT is ENTERED in favor of defendants and against plaintiff, and plaintiff shall have and recover NOTHING of defendants.

Costs are taxed against plaintiff.

DONE this 13th day of August, 1985.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND JACKSON, PLAINTIFF	)	
VS.	)	CIVIL ACTION NO.
NATIONAL BROADCASTING COMPANY, INC., et al., DEFENDANTS	)	85-AR-0826-S

MEMORANDUM OPINION

Defendants, National Broadcasting Company, Inc. (NBC), Warner Brothers Television (Warner), and D. C. Comics, Inc. (D.C.), separately move this court to grant summary judgment in their favor according to Rule 56, F.R.Civ.P. In order to obtain a favorable ruling defendants must satisfy the court that there is no genuine issue of any material fact based on the affidavits of Kenneth Johnson, Roger Greenberger, Rebecca Sobel, Emily Boxer, the deposition of plaintiff, Raymond Jackson himself, and the pleadings.

STATEMENT OF UNDISPUTED FACTS

On September 24, 1981, Jackson obtained a certificate of copyright registration on a graphic art design consisting of a depiction of a spaceship. Jackson entitled this spaceship "Colossus". Colossus is the spaceship used by a proposed comic book hero named "Colossal Man". Jackson also developed the idea of Colossal Man.

At the time Jackson developed these ideas about Colossal Man he was a resident of Columbus, Ohio. His hometown newspaper ran a story concerning Jackson and his Colossal Man. One of the national wire services picked up the story. Rebecca Sobel, an NBC news correspondent in Pittsburg, Pennsylvania, read the story from the wire service and contacted Jackson about the possibility of doing a story on him. After speaking with Jackson on the telephone, Sobel determined not to do the story on Colossal Man. Following their telephone conversation, Jackson nevertheless

sent some of the Colossal Man material to Sobel.

In an attempt to promote Colossal Man, Jackson then went to New York City. On September 30, 1981, he went to the NBC studios and talked with Emily Boxer. Boxer was the Book Coordinator for NBC's "Today Show". Her job was to schedule and to arrange for authors to appear on the "Today Show" so as to promote their works. After the interview, Boxer stated that she could not arrange anything for Jackson. He nevertheless left some of his Colossal Man material with Boxer before he departed. Jackson did not talk to anyone else at NBC about his Colossal Man, nor did he talk to anyone associated with the other defendants.

Later NBC aired a television movie, mini-series, and series "V" about certain aliens invading Earth. These aliens travelled in spaceships, one of which was the "Mothership". Warner produced the shows and D.C. later obtained rights to publish a comic book series

concerning the same characters as were in the movie, etc.

Jackson argues that the design of the "V" Mothership was actually his copyrighted design of Colossus. He brings this suit against NBC, Warner, and D. C. for the alleged infringement of his copyrighted design.

Defendants say flatly that the design of "Mothership" originated with Kenneth Johnson and Charles Davis, who were employed by Warner to work on the movie.

THE APPLICABLE LAW

To establish copyright infringement, plaintiff must prove (1) his ownership of the copyright, and (2) "copying" by a defendant, or by a person who worked for a defendant. Ferguson v. National Broadcasting Co., 584 F.2d 111,113 (5th Cir. 1978), citing 3 M. Nimmer, Copyright §§13.01 and 13.02 [A] (1978). Viewing the evidence in the light most favorable to plaintiff, as the court must for purposes of considering defendants'

motions for summary judgment, the court concludes that Jackson has ownership of the copyright. Thus the court turns its attention to the second prong of the test.

Since there is usually no direct evidence of "copying", the law realistically allows a plaintiff to meet his burden of proof of this element by demonstrating that the person who did the work for the defendant had access to the copyrighted work and that the defendant's work is substantially similar to the plaintiff's. Ferguson, 584 F.2d at 113. "Access has been defined to include an opportunity to view the copyrighted work". Id.citing 3 M. Nimmer, Copyright §13.02[A] (1978).

In defense of defendants' Rule 56 motions plaintiff relies heavily on Smith v. Little, Brown & Co., 245 F. Supp 451 (S.D.N.Y. 1965). Little, Brown may or may not express the law of the Eleventh Circuit. Little, Brown concerned an alleged copyright infringement by Edith Meyer of Smith's unpublished work in

Meyer's published book Pirate Queen. Both works concerned stories about a 16th century Irish "pirate queen" named Grania O'Malley. Smith had previously submitted her manuscript to Little, Brown. Her manuscript was read and considered for publication but eventually was rejected by Little, Brown. Helen Jones, an editor of Little, Brown, was a friend of Meyer's. Jones was aware of the previous work written by Smith. Jones urged Meyer to write a book about Grania O'Malley. Meyer eventually did write the book. After the publication of Pirate Queen, Smith brought her complaint alleging copyright infringement. The district court, in its opinion, pointed to several similarities between the two authors' works. Although the tales in both books involved different original and unique ideas, the court found that the two were substantially similar. Additionally the court found that access existed because Jones had access to Smith's work and Meyer had access to

Jones. Id. at 458. Based on these findings the court found the plaintiff, Smith.

The case sub judice is readily distinguishable from Smith v. Brown, Little. The overall concept of the Colossus spaceship is certainly not unique. This court has seen a thousand similarly shaped space vehicles in the past 40 years. The Colossus is no more than a circular disc shape common to many spaceship designs of the past, of the present, and probably of the future. Jackson even admits that his Colossus spaceship is not identical to the "V" Mothership. Rather, he claims that his "overall" design and concept was used. The fact that the "V" Mothership is also shaped in a circular disc fashion does not suffice to make out a prima facie case and to support Jackson's suspicion.

Jackson asserts that NBC, and subsequently the other defendants, obtained access to his Colossus design as a result of his leaving copies of Colossus with both Sobel and Boxer. However, Sobel and Boxer in their

uncontradicted affidavits swear that they did not even retain the Colossal Man material given them by Jackson. Furthermore, Kenneth Johnson, co-designer of the "V" Mothership swears that neither he nor his partner received any help whatsoever in designing the spaceship. Johnson's partner, Charles Davis, died earlier this year. Jackson simply fails to offer any direct evidence to contradict any of these sworn statement, and Jackson's circumstantial evidence is not enough to make out a prima facie case in light of the requirements that this court take an intelligent look at the copyrighted material itself and take judicial notice of the fact that a copyright is not extremely difficult to obtain and cannot be thought to protect against every similarity, especially when the design concept does not, by any stretch of the imagination, constitute any kind of creative "break through". If defendants had used the name "Colossus" instead of Mothership, perhaps the story would be different, but then,

perhaps not, inasmuch as the word "Colossus" can be found in any dictionary. If Colossus would actually fly into space and its engineering concept had been patented, the case would, of course, be an entirely different case.

To find that defendants had "access" to Jackson's copyrighted spaceship, this court would have to assume (1) that Sobel or Boxer lied and did not throw away the spaceship design but, rather, gave it to someone else at NBC, and (2) that Kenneth Johnson lied when he stated that he and his partner had no assistance in designing the "V" Mothership. This court is unwilling to conclude that either of these assumptions is true, much less that both are true. If the court should allow a jury to find "access", the finding would necessarily be based on impermissible speculation or conjecture. Ferguson, 584 F.2d at 113. "To support a finding of access there must be a reasonable possibility of access--not a bare possibility...." Id. This

court finds no such "reasonable possibility".

Plaintiff's former counsel not only worried about her inability to relate to Jackson as his attorney, but she worried about the implications inherent in Rule 11, F.R.Civ.P. The court tends to agree that Jackson's claim is without colorable merit and consists very largely of grandiose wishful thinking. In sum, the case is one better designed for disposition under Rule 56 than Jackson's spaceship is designed for space flight.

The court will grant defendants' motions for summary judgment by separate order.

DONE this 13th day of August, 1985.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-7580

RAYMOND JACKSON,

Plaintiff-Appellant,

versus

NATIONAL BROADCASTING COMPANY, INC., WARNER BROTHERS TELEVISION; and D. C. COMICS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion April 23, 11 Cir., 1986 __F.2d__)

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.
PER CURIAM:

(XX) The Petition for Reharing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-7580
Non-Argument Calendar

RAYMOND JACKSON,

Plaintiff-Appellant,

versus

NATIONAL BROADCASTING COMPANY, INC.,
WARNER BROTHERS TELEVISION; and
D. C. COMICS, INC.,

Defendant-Appellees

Appeal from the United States District Court
for the Northern District of Alabama

(April 23, 1986)

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Cir. R. 25.[1]

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[1] Appellant's motion to supplement the record is GRANTED. Appellees' motion to dismiss the appeal is DENIED as moot. Appellant's motion for leave to file an amended complaint of evidence on the file of the records in the Eleventh Circuit is DENIED.

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk
56 Forsyth Street, N. W.
Atlanta, Georgia 30303
June 3, 1986

TO ALL PARTIES BELOW:

NO. 85-7580 RAYMOND JACKSON -v- NATIONAL BROADCASTING COMPANY, et al

D.C. # CV85-AR-0826-S

/XX/ No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

Very truly yours,

SPENCER D. MERCER,
Clerk

cc: Raymond Jackson
James C. Barton
Patrick M. Lavette

By _____
Deputy Clerk

AFFIDAVIT OF KENNETH JOHNSON

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

In summation, I affirmatively state the following: The design of the Mothership used in the "V" series was original with myself and Charles R. Davis. The Mothership was completely the product of our own imaginations, and was not copied from any other design. Neither Charles R. Davis nor I ever saw any design created by Raymond Jackson, Neither Charles R. Davis nor I ever saw a design of the Colossus Spaceship. Neither Charles R. Davis nor I ever saw any Colossal Man materials. I have had no contact with either Ms. Rebecca Sobel or Ms. Emily Boxer of NBC News. Neither Ms. Boxer nor Ms. Sobel ever sent me any materials. No NBC personnel provided any spaceship design or model which was used by myself, Davis, or anyone on my staff. No NBC personnel had any input whatsoever into the design of the "V" Mothership. This same Mothership design was used in the subsequent "V" productions, and is the model on which D.C. Comics' "V" drawings are based.

Kenneth Johnson, Affiant

Sworn to and subscribed before me this ___ day of ___ 1985.

Excerpt from unnotarized affidavit submitted by Kenneth Johnson, a defendant in the case (note the signature). This affidavit was unnotarized as of as of June 21, 1985.

AFFIDAVIT OF KENNETH JOHNSON

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

In summation, I affirmatively state the following: The design of the Mothership used in the "V" series was original with myself and Charles R. Davis. The Mothership was completely the product of our own imaginations, and was not copied from any other design. Neither Charles R. Davis nor I ever saw any design created by Raymond Jackson, Neither Charles R. Davis nor I ever saw a design of the Colossus Spaceship. Neither Charles R. Davis nor I ever saw any Colossal Man materials. I have had no contact with either Ms. Rebecca Sobel or Ms. Emily Boxer of NBC News. Neither Ms. Boxer nor Ms. Sobel ever sent me any materials. No NBC personnel provided any spaceship design or model which was used by myself, Davis, or anyone on my staff. No NBC personnel had any input whatsoever into the design of the "V" Mothership. This same Mothership design was used in the subsequent "V" productions, and is the model on which D.C. Comics' "V" drawings are based.

Kenneth Johnson, Affiant

Sworn to and subscribed before me this 20th day of June, 1985.

NOTE: IN HIS AFFIDAVIT MR. JOHNSON STATED THAT HIS FRIEND CHUCK DAVIS DID ALL OF THE DESIGNS OF THE "V" MOTHERSHIP, AND THAT HIS FRIEND HAD DIED THE EARLY PART OF 1985 AND THAT HE NOR HIS FRIEND HAD EVER SEEN ANY OF THE COLOSSUS SPACESHIP DESIGNS AND THE COURT ACCEPTED THIS TESTIMONY OF MR. JOHNSON FOR MR. DAVIS, WHO HAD DIED. ONLY MR. JOHNSON COULD NOT HAVE SPOKEN WITH MR. DAVIS BECAUSE A DEATH CERTIFICATE SHOWED MR. DAVIS DIED ON DECEMBER 3rd, 1984 FOUR MONTHS BEFORE THE LAWSUIT WAS FILED MARCH 19th, 1985. THIS WAS EVIDENCE WITHHELD BY THE DEFENDING ATTORNEY'S UNTIL THEY RECEIVED THEIR SUMMARY JUDGMENT.

NOTE: THE APPEAL COURT ACCEPTED CONCLUSIVE EVIDENCE THAT THE TWO SPACESHIPS WERE IDENTICAL--SUBSTANTIALLY SIMILAR. COPYRIGHT LAW STATES WHEN THERE IS A COPYRIGHT GRANTED, THE PLAINTIFF HAS ONLY TO SHOW SIMILARITY WHEN THERE IS ACCESS TO THE MATERIAL. IT WAS PROVEN THERE WAS ACCESS. WHEN THERE IS NO ACCESS, THEN THE PLAINTIFF MUST SHOW SUBSTANTIAL SIMILARITY.

AFFIDAVIT OF REBECCA SOBEL

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I have absolutely no contact with the personnel in NBC's entertainment divisions. I did not show or deliver any of the materials sent me by Mr. Jackson to anyone in NBC's entertainment divisions. No person from NBC's entertainment divisions had any access to the materials sent to me by Mr. Jackson.

I have no contact with any personnel from Warner Bros. Television. I did not show nor deliver any of the materials sent me by Mr. Jackson to anyone at Warner Bros. Television. No person at Warner Bros. Television had access to any of the materials sent to me by Mr. Jackson.

_____

Rebecca Sobel, Affiant

Sworn to and subscribed before me this

___ day of _____ 1985.

Excerpt from unsigned and unnotarized affidavit submitted by Rebecca Sobel, a defendant in the case. This affidavit was unsigned and unnotarized as of June 21, 1985. However, July 5 records show a notarized and signed affidavit, dated June 1.

AFFIDAVIT OF REBECCA SOBEL

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I have absolutely no contact with the personnel in NBC's entertainment divisions. I did not show or deliver any of the materials sent me by Mr. Jackson to anyone in NBC's entertainment divisions. No person from NBC's entertainment divisions had any access to the materials sent to me by Mr. Jackson.

I have no contact with any personnel from Warner Bros. Television. I did not show nor deliver any of the materials sent me by Mr. Jackson to anyone at Warner Bros. Television. No person at Warner Bros. Television had access to any of the materials sent to me by Mr Jackson.

Rebecca Sobel

Rebecca Sobel, Affiant

Sworn to and subscribed before me this 1st day of July 1985.

Anne M. Nardello

Notary Public

My Commission Expires: 3/30/86

ANNE M. NARDELLO
Notary Public, State of New York
No. 30-4713126 Qual. in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1986

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk
50 Spring Street SW
Atlanta, Georgia 303 3147

October 28, 1985

TO: COUNSEL FOR APPELLEE

NO. 85-7580 - RAYMOND JACKSON v. NBC, INC., et al.
(DC No. CV85-AR-0826-S)

(X) Enclosed is the record on appeal and copy of appellant's pro se brief for your use in preparation of your brief. The record must be returned to this office at the time your brief is transmitted to this office. Special care should be taken for the safe handling and return of these papers.

Very truly yours,

SPENCER D. MERCER, CLERK

By: _____
Deputy Clerk

Encl.: ONE VOLUME RECORD ON APPEAL

cc: Mr. Raymond Jackson

NOTE TO MR. JACKSON: Returned herewith are your motions to supplement the record and to require payments of expenses where affidavits were made in bad faith; these motions are being returned because you do not show that they were served on opposing counsel.

NBC Visitor's Temporary Pass

30 SEP 81 11:54

Admit 3

Name Raymond Jackson

Company Emily Boker

Destination 701 A

Please return to Security upon leaving.

V 39556

SV-1207A (2/80)

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-796

IN THE

Supreme Court Of The United States

October Term, 1986

RAYMOND JACKSON,
Petitioner

vs.

NATIONAL BROADCASTING COMPANY; WARNER BROS. TELEVISION; and D.C. COMICS, INC.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

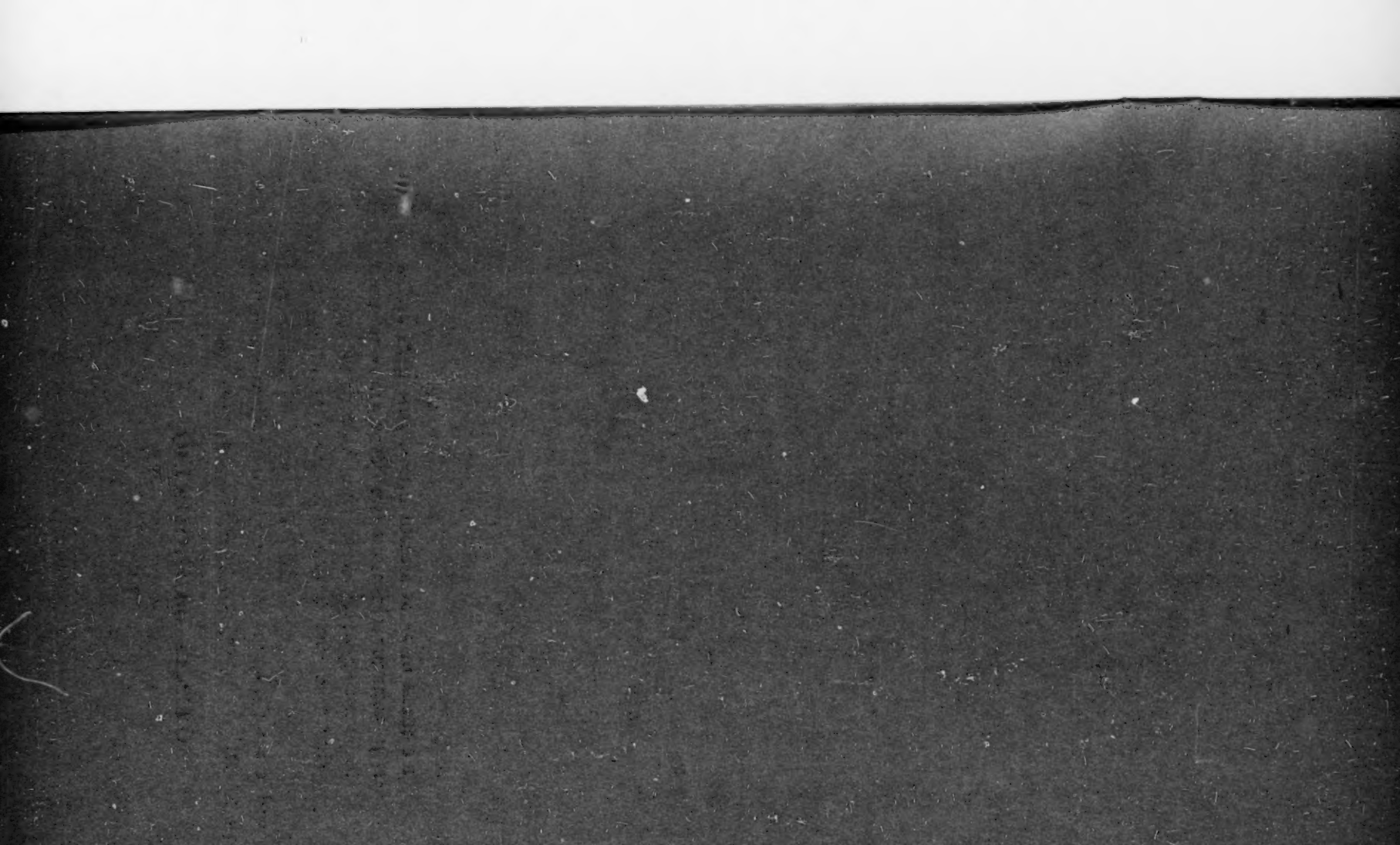
RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES C. BARTON, SR.
1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

Counsel of Record for Respondents, National Broadcasting Company, Warner Bros. Television, and D. C. Comics, Inc.

OF COUNSEL:

JOHNSTON, BARTON, PROCTOR, SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616



QUESTIONS PRESENTED

1. Whether a writ of certiorari should be granted when the petition was filed ninety-one days following the appeal court's final order?

2. Whether a writ of certiorari may be properly granted regarding an appeals court's *per curiam* decision entered without opinion where absolutely no important issue of law exists, and where such writ would merely serve to grant a review of evidence and specific facts having no impact or importance outside of this case?

PARTIES TO THE PROCEEDING

Parties:

Raymond Jackson
National Broadcasting Company
Warner Bros. Television
D. C. Comics, Inc.

Affiliated or Related Parties:

The parent company for both Warner Bros. Television and D. C. Comics, Inc., is Warner Communications, Inc.

The parent company of National Broadcasting Company, is RCA. RCA has recently been acquired by General Electric Company.

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No. 86-796

IN THE

Supreme Court Of The United States

October Term, 1986

RAYMOND JACKSON,
Petitioner

vs.

NATIONAL BROADCASTING COMPANY; WARNER BROS. TELEVISION; and D.C. COMICS, INC.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Plaintiff Raymond Jackson filed a *pro se* complaint in the United States District Court for the Northern District of Alabama on March 19, 1985, naming as defendants Warner Bros. Television ("Warner Bros."), The National Broadcasting Company ("N.B.C."), and The Fireman's Fund Insurance Companies ("Fireman's Fund"). An amended complaint was filed by Jackson's subsequently-retained counsel on May 17, 1985, dismissing Fireman's Fund as a defendant, and adding D.C. Comics, Inc. ("D.C."). The complaints alleged that the

defendants had infringed upon a copyright Jackson claimed in certain drawings of a flying saucer ("the Colossus") made in conjunction with a comic book hero ("Colossal Man") created by Jackson. The alleged infringement came about through the depictions of a fictional flying saucer ("the Mothership") seen in two television movies, entitled "V-The Visitors" and "V-The Final Battle," and in a "V" comic book series. Warner Bros. produced the television movies and N.B.C. broadcast them. D.C. published the "V" comic books. Jackson alleged that the defendants had copied his designs from Colossal Man drawings he had provided to two N.B.C. employees, Rebecca Sobel and Emily Boxer. Sobel was an N.B.C. News Correspondent in Pittsburgh. Boxer was the "Book Coordinator" for N.B.C.'s "Today Show."

On June 11, 1985, Jackson's attorney filed a motion for leave to withdraw as counsel, which the district court denied. A renewed motion to withdraw was filed on June 20, 1985. Motions for Summary Judgment were filed on behalf of all the defendants on June 21, 1985, the date scheduled by the district court for a pre-trial conference. At this conference, the court heard Jackson's attorney's motion to withdraw and took it under advisement. Jackson attorney was granted leave to withdraw by order of the court dated June 25, 1985, and Jackson has acted as *pro se* counsel since that time. That same order set out that the defendants' motion for summary judgment would be taken under submission on July 5, 1985, on the affidavits and other materials submitted by any party by that date.

The defendants' motions were supported by affidavits submitted by Sobel and Boxer which set out that neither had supplied Jackson's materials to any other N.B.C. or Warner Bros. personnel, and that each had thrown the materials away. An affidavit submitted by independent television producer and California native Kenneth Johnson set out that he conceived of, created, wrote, and directed the original "V" movie for Warner Bros. Johnson affirmed that the design of the "V" mothership was the result of a collaboration between himself and the late Charles Davis, who had been Johnson's production

designer. Johnson stated that neither he nor Davis had had any access to Jackson's work nor any contact with Sobel or Boxer.

Because signed and notarized affidavits had not been received from Sobel and Johnson on June 21, 1986, their unsigned and unnotarized affidavits were submitted along with the motions for summary judgment; the motions warranted that fully executed affidavits would be submitted in a timely manner. Signed affidavits were submitted on July 5, 1986, the submission date set by the district court. Jackson submitted no affidavits or other evidence in opposition to the motions made by defendants.

The district court entered summary judgments on behalf of all the defendants by an order of August 12, 1985, accompanied by a memorandum opinion. (App. A) Jackson filed Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on September 6, 1985. On appeal, Jackson alleged, via various motions and briefs, that the district court opinion was based on unsigned and untruthful affidavits. Apparently, after it became clear that the signed affidavits were timely filed and in the record, Jackson then alleged that the affidavits had been surreptitiously placed in the record via various alleged conspiracies between defendants' counsel and personnel in the clerk's offices of the trial court and the appeals court. The Eleventh Circuit affirmed the district court's decision, without opinion, in a *per curiam* decision on April 23, 1986. (App. B) Jackson's Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by the Eleventh Circuit on June 3, 1986. (App. C) Jackson's petition for writ of certiorari was docketed by the Clerk of this Court on September 2, 1986.

ARGUMENT

I. Jackson's Petition for Writ of Certiorari Was Untimely Filed and May Not Be Granted.

The Eleventh Circuit's *per curiam* opinion, was entered April 23, 1986. Jackson's Petition for Rehearing and Suggestion for Rehearing En Banc was denied June 3, 1986. Jackson's original Petition for Writ of Certiorari was filed on September 2, 1986. It did not conform to the standards set by the Rules of this Court. Sup. Ct. R. 33. In conformance with the rules, the Clerk informed Jackson that if new and proper copies of his petition were promptly substituted, the petition would be deemed filed as of September 2, 1986. Sup. Ct. R. 33.7. Further petitions were submitted in October 1986. These were also returned by the Clerk. Corrected petitions were finally submitted November 24, 1986, and were deemed filed as of September 2, 1986.

Supreme Court Rule 20.2 and 28 U.S.C. § 2101 (c) provide that a writ of certiorari must be requested by filing within ninety days after the entry of the final decree or judgment. Jackson's first application was filed ninety-one days following the Eleventh Circuit's final order. Accordingly, it was jurisdictionally late and the Clerk should have refused to receive the petition. Sup. Ct. R. 20.3. The petition may have been docketed due to the fact that Jackson's petition completely omits the date the final order was entered. The Rules of this Court provide:

> While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules, or when it appears that the document is obviously and jurisdictionally out of time.

Sup. Ct. R. 46.3. This Court is without jurisdiction, and the petition should be denied.

II. The Case Involves No Important Issues of Law Which Require this Court's Review but Only Involves Questions of Evidence and Specific Facts Properly Determined Below.

This case does not present any "special and important reasons" compelling this Court's review. *See* Sup. Ct. R. 17. The case involves only issues of fact and evidence that two previous courts have determined fail to state a claim of copyright infringement. Jackson's fanciful assertions regarding evidence-tampering, conspiracy theories, and forgeries are not properly before this Court and simply do not merit this Court's review.

This Court has long ago stated that a grant of certiorari is not warranted "merely to review the evidence or draw inferences from it." *General Talking Pictures Corporation v. Western Electric Company,* 304 U.S. 175, 178 (1938); *accord., United States v. Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, a decision from this Court could have no possible effect on any other case and cannot benefit the public at large. "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . ." *N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951).

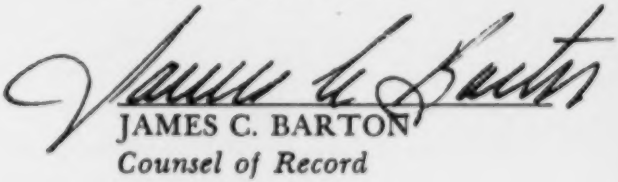
Finally, the case below was properly and fairly decided according to well-settled principles of law and procedure. The district court's opinion relied on the controlling precedent in the Eleventh Circuit, *Ferguson v. National Broadcasting Co.,* 584 F. 2d 111, 113 (5th Cir. 1978). *Ferguson* held that in order for a copyright plaintiff to prove that a defendant had "access" to plaintiff's work, he must prove a "reasonable possibility of access — not a bare possibility. . . ." *Id.* at 113. The *Ferguson* case also held that summary judgment was proper where defendant's evidence negates any reasonable possibility of such access. Because there is no evidence in this case to rebut defendants' proof that the creator of its designs had no access to Jackson's

materials, the district court properly concluded that only a bare possibility of such access existed and that summary judgment was due to be granted. Fed. R. Civ. P. 56(e). The district court did not consider Jackson's assertions of evidence-tampering, forgeries, or conspiracies. These issues were not properly before the appeals court, nor were they considered. The Eleventh Circuit affirmed the district court without opinion, indicating thereby that the summary judgment was supported by the record and that no error of law appeared. *See* 11th Cir. R. 25. No issues exist for this Court's review.

CONCLUSION

For the foregoing reasons, Jackson's Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,



JAMES C. BARTON
Counsel of Record
for Respondents

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Respondents' Joint Brief in Opposition to Petition for Writ of Certiorari was served upon Petitioner *pro se,* Raymond Jackson, 7200 Westmoreland Drive, Fairfield, Alabama 35064, by depositing the same in the United States mail, first class postage prepaid, this 29th day of December, 1986.

Counsel of Record
for Respondents

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND JACKSON,	)	
PLAINTIFF	)	
VS.	)	CIVIL ACTION NO. 85-AR-0826-S
NATIONAL BROADCASTING COMPANY, INC., et al.,	)	
DEFENDANTS	)	

ORDER GRANTING SUMMARY JUDGMENT

In conformity with the accompanying Memorandum Opinion, the court expressly determines that there exists no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. It is therefore

ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgment are GRANTED. JUDGMENT is ENTERED in favor of defendants and against plaintiff, and plaintiff shall have and recover NOTHING of defendants.

Costs are taxed against plaintiff.

DONE this 13th day of August, 1985.

/s/ WILLIAM M. ACKER, JR.

William M. Acker, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND JACKSON,	)	
PLAINTIFF	)	
VS.	)	CIVIL ACTION NO. 85-AR-0826-S
NATIONAL BROADCASTING COMPANY, INC., et al.,	)	
DEFENDANTS	)	

MEMORANDUM OPINION

Defendants, National Broadcasting Company, Inc. (NBC), Warner Brothers Television (Warner), and D.C. Comics (D.C.), separately move this court to grant summary judgment in their favor according to Rule 56, F.R.Civ.P. In order to obtain a favorable ruling defendants must satisfy the court that there is no genuine issue of any material fact based on the affidavits of Kenneth Johnson, Roger Greenberger, Rebecca Sobel, Emily Boxer, the deposition of plaintiff, Raymond Jackson himself, and the pleadings.

STATEMENT OF UNDISPUTED FACTS

On September 24, 1981, Jackson obtained a certificate of copyright registration on a graphic art design consisting of a depiction of a spaceship. Jackson entitled this spaceship "Colossus". Colossus is the spaceship used by a proposed comic book hero named "Colossal Man". Jackson also developed the idea of Colossal Man.

At the time Jackson developed these ideas about Colossal Man he was a resident of Columbus, Ohio. His hometown newspaper ran a story concerning Jackson and his Colossal

Man. One of the national wire services picked up the story. Rebecca Sobel, an NBC news correspondent in Pittsburgh, Pennsylvania, read the story from the wire service and contacted Jackson about the possibility of doing a story on him. After speaking with Jackson on the telephone, Sobel determined not to do the story on Colossal Man. Following their telephone conversation, Jackson nevertheless sent some of the Colossal Man material to Sobel.

In an attempt to promote Colossal Man, Jackson then went to New York City. On September 30, 1981, he went to the NBC studios and talked with Emily Boxer. Boxer was the Book Coordinator for NBC's "Today Show". Her job was to schedule and to arrange for authors to appear on the "Today Show" so as to promote their works. After the interview, Boxer stated that she could not arrange anything for Jackson. He nevertheless left some of his Colossal Man material with Boxer before he departed. Jackson did not talk to anyone else at NBC about his Colossal Man, nor did he talk to anyone associated with the other defendants.

Later NBC aired a television movie, mini-series, and series "V" about certain aliens invading Earth. These aliens travelled in spaceships, one of which was the "Mothership". Warner produced the shows and D.C. later obtained rights to publish a comic book series concerning the same characters as were in the movie, etc.

Jackson argues that the design of the "V" Mothership was actually his copyrighted design of Colossus. He brings this suit against NBC, Warner, and D.C. for the alleged infringement of his copyrighted design.

Defendants say flatly that the design of "Mothership" originated with Kenneth Johnson and Charles Davis, who were employed by Warner to work on the movie.

THE APPLICABLE LAW

To establish copyright infringement, plaintiff must prove (1) his ownership of the copyright, and (2) "copying" by a defendant, or by a person who worked for a defendant. *Fergu-*

son v. National Broadcasting Co., 584 F.2d 111, 113 (5th Cir. 1978), *citing* 3 M. Nimmer, Copyright §§ 13.01 and 13.02[A] (1978). Viewing the evidence in the light most favorable to plaintiff, as the court must for purposes of considering defendants' motions for summary judgment, the court concludes that Jackson has ownership of the copyright. Thus the court turns its attention to the second prong of the test.

Since there is usually no direct evidence of "copying", the law realistically allows a plaintiff to meet his burden of proof of this element by demonstrating that the person who did the work for the defendant had access to the copyrighted work and that the defendant's work is substantially similar to the plaintiff's. *Ferguson*, 584 F.2d at 113. "Access has been defined to include an opportunity to view the copyrighted work". *Id. citing* 3 M. Nimmer, Copyright § 13.02[A] (1978).

In defense of defendants' Rule 56 motions plaintiff relies heavily on *Smith v. Little, Brown & Co.*, 245 F.Supp. 451 (S.D. N.Y. 1965). *Little, Brown* may or may not express the law of the Eleventh Circuit. *Little, Brown* concerned an alleged copyright infringement by Edith Meyer of Smith's unpublished work in Meyer's published book *Pirate Queen*. Both works concerned stories about a 16th century Irish "pirate queen" named Grania O'Malley. Smith had previously submitted her manuscript to Little, Brown. Her manuscript was read and considered for publication but eventually was rejected by Little, Brown. Helen Jones, an editor of Little, Brown, was a friend of Meyer's. Jones was aware of the previous work written by Smith. Jones urged Meyer to write a book about Grania O'Malley. Meyer eventually did write the book. After the publication of *Pirate Queen*, Smith brought her complaint alleging copyright infringement. The district court, in its opinion, pointed to several similarities between the two authors' works. Although the tales in both books involved different original and unique ideas, the court found that the two were substantially similar. Additionally the court found that access existed, because Jones had access to Smith's work and Meyer had access

to Jones. *Id.* at 458. Based on these findings the court found for the plaintiff, Smith.

The case *sub judice* is readily distinguishable from *Smith v. Brown, Little.* The overall concept of the Colossus spaceship is certainly not unique. This court has seen a thousand similarly shaped space vehicles in the past 40 years. The Colossus is no more than a circular disc shape common to many spaceship designs of the past, of the present, and probably of the future. Jackson even admits that his Colossus spaceship is not identical to the "V" Mothership. Rather, he claims that his "overall" design and concept was used. The fact that the "V" Mothership is also shaped in a circular disc fashion does not suffice to make out a prima facie case and to support Jackson's suspicion.

Jackson asserts that NBC, and subsequently the other defendants, obtained access to his Colossus design as a result of his leaving copies of Colossus with both Sobel and Boxer. However, Sobel and Boxer in their uncontradicted affidavits swear that they did not even retain the Colossal Man material given them by Jackson. Furthermore, Kenneth Johnson, co-designer of the "V" Mothership swears that neither he nor his partner received any help whatsoever in designing the spaceship. Johnson's partner, Charles Davis, died earlier this year. Jackson simply fails to offer any direct evidence to contradict any of these sworn statements, and Jackson's circumstantial evidence is not enough to make out a prima facie case in light of the requirements that this court take an intelligent look at the copyrighted material itself and take judicial notice of the fact that a copyright is not extremely difficult to obtain and cannot be thought to protect against every similarity, especially when the design concept does not, by any stretch of the imagination, constitute any kind of creative "break through". If defendants had used the name "Colossus" instead of Mothership, perhaps the story would be different, but then, perhaps not, inasmuch as the word "Colossus" can be found in any dictionary. If Colossus would actually fly into space and its engineering concept had

been patented, the case would, of course, be an entirely different case.

To find that defendants had "access" to Jackson's copyrighted spaceship, this court would have to assume (1) that Sobel or Boxer lied and did not throw away the spaceship design but, rather, gave it to someone else at NBC, and (2) that Kenneth Johnson lied when he stated that he and his partner had no assistance in designing the "V" Mothership. This court is unwilling to conclude that either of these assumptions is true, much less that both are true. If the court should allow a jury to find "access", the finding would necessarily be based on impermissible speculation or conjecture. *Ferguson,* 584 F.2d at 113. "To support a finding of access there must be a reasonable possibility of access — not a bare possibility. . . ." *Id.* This court finds no such "reasonable possibility".

Plaintiff's former counsel not only worried about her inability to relate to Jackson as his attorney, but she worried about the implications inherent in Rule 11, F.R.Civ.P. The court tends to agree that Jackson's claim is without colorable merit and consists very largely of grandiose wishful thinking. In sum, the case is one better designed for disposition under Rule 56 than Jackson's spaceship is designed for space flight.

The court will grant defendants' motions for summary judgment by separate order.

DONE this 13th day of August, 1985.

/s/ WILLIAM M. ACKER, JR.

William M. Acker, Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7580
Non-Argument Calendar

D.C. Docket No. 85-0826

RAYMOND JACKSON,

Plaintiff-Appellant,

versus

NATIONAL BROADCASTING COMPANY, INC., WARNER BROTHERS TELEVISION; and D. C. COMICS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(April 23, 1986)

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Cir. R. 25.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: April 23, 1986
For the Court: Spencer D. Mercer, Clerk
By: /s/ WARREN A. GODFREY
Deputy Clerk

ISSUED AS MANDATE: June 18, 1986.

[1]Appellant's motion to supplement the record is GRANTED. Appellees' motion to dismiss the appeal is DENIED as moot. Appellant's motion for leave to file an amended complaint of evidence on the file of the records in the Eleventh Circuit is DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7580

RAYMOND JACKSON,

Plaintiff-Appellant,

versus

NATIONAL BROADCASTING COMPANY, INC., WARNER BROTHERS TELEVISION; and D. C. COMICS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 23, 11 Cir., 1986, ... F.2d .....).
(June 3, 1986)

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. L. ANDERSON

United States Circuit Judge

APPENDIX D

Statutes and Rules

28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

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(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend time for applying for a writ of certiorari for a period not exceeding sixty days.

Sup. Ct. R. 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way or conflict with applicable decisions of this Court.

Sup. Ct. R. 20. Review on certiorari — time for petitioning

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.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Sup. Ct. R. 33. Form of jurisdictional statements, petitions, briefs, appendices, motions, and other documents filed with the court

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.7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

Sup. Ct. R. 46. Proceedings in forma pauperis

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.3. All papers and documents presented under this Rule shall be clearly legible and should, whenever possible, comply with Rule 39. While making due allowance for any case presented under the Rule by a person appearing *pro se*, the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules, or when it appears that the document is obviously and jurisdictionally out of time.

Fed. R. Civ. P. 56. Summary Judgment

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(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposting affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all pages or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

11th Cir. R. 25. Affirmance without opinion.

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is not insufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.